Case No. SC87083

IN THE MISSOURI SUPREME COURT

HEALTHCARE SERVICES OF THE OZARKS, INC.,
d/b/a OXFORD HEALTHCARE

Respondent/Cross-Appellant

v.

PEARL WALKER COPELAND and LUANN HELMS

Appellants/Respondents

APPEAL FROM THE
CIRCUIT COURT OF NEWTON COUNTY, MISSOURI
40TH JUDICIAL CIRCUIT
The Honorable Gregory Stremel

SUBSTITUTE REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT

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REPLY TO APPELLANTS/RESPONDENTS' ARGUMENTS

A. Point I – Oxford's Claim for Damages –

1. Introduction:

Appellants begin their Reply Brief with the following statement (Appellants' Reply Brief, at p. 6):

> Oxford seeks to have the court [sic] overturn the trial courts [sic] finding that it sustained no damage. . . .

Such statement is incorrect. The Trial Court did not find that Oxford did not sustain damages. In fact, no one contested that Oxford lost employees and clients to the new competitor, Integrity. *Infra*. Rather, the Trial Court held that Oxford failed to prove that specific employees or clients of Oxford switched to Integrity due to the efforts of Copeland and Helms. (L.F. 147). In other words, the Trial Court apparently was not going to award damages to Oxford unless Oxford presented evidence from its former employees or clients that they switched to Integrity because of the actions of, or their relationship with, Copeland or Helms.

Given such holding by the Trial Court, Oxford did not appeal the damages issue as to Helms. However, there was another breach by Copeland which the Trial Court failed to mention or address in considering the damages issue, and Copeland and Helms now make the same mistake in their Reply Brief.

2. Causation:

As outlined in detail in Oxford's initial Brief, at pp. 44-47, it is undisputed/admitted by all parties that Integrity was allowed to contract with the Missouri Division of Aging, and provide services in competition with Oxford from its formation until July 3, 2000, based on Copeland's allowing Integrity to use her Certificate of Provider Certification Training. (L.F. 110-13). Such action clearly violated the provisions of her non-compete agreement with Oxford, specifically Paragraph 2. (L.F. 115). Integrity relied on Copeland's Certificate until July 3, 2000. (L.F. 113). Therefore, but for Copeland's allowing Integrity to use her Certificate of Provider Certification Training, Integrity would not have been in business prior to July 3, 2000, and there is clear causation between such breach by Copeland and all employees and clients which left Oxford to go to Integrity prior to July 3, 2000. Rick McGee, Oxford's Vice President of Support Services, testified in this regard (Tr. 70):

> Q. And if Integrity Home Care had not been formed, you wouldn't have had employees leaving to go to Integrity Home Care. It wouldn't have been possible.
>
> A. That's correct.
>
> Q. And if Integrity Home Care would not have been formed, you wouldn't have clients following employees of yours that went to Integrity?
>
> A. That's correct.

Q. And to get a contract with the State of Missouri, Division of Aging, to provide in-home services, you have to have a certification from an individual that's trained, a provider certification, correct?

A. Yes, you do.

Q. And Integrity Home Care used Pearl Copeland's certification to get their contract?

A. Yes, they did.

In addition, Copeland admitted such facts. (L.F. 113; Tr. 107-08, 125-26).

3. <u>Amount of Damages</u>:

Once causation is established, the next issue is the amount of damages. As to the specific employees and clients who left Oxford to go to Integrity, Mr. McGee testified and presented detailed exhibits outlining Oxford's losses. *See* pp. A-16 – A-18 of Substitute Appendix to Substitute Brief of Respondent/Cross-Appellant. There was no contrary evidence presented by Copeland or Helms. Copeland and Helms did <u>not</u> question that employees and clients left Oxford to go to Integrity. Rather, they simply questioned the individual reasons each employee or client had for their leaving, which is irrelevant, as outlined above. For example, the type of questions asked Mr. McGee by counsel for Copeland and Helms in this regard is illustrated by the following exchange (Tr. 54-55, 57-58):

Q. You don't know, for instance--well, since you didn't talk to any of these people on Plaintiff's Exhibit P-1, you don't know if they got a raise when they went to work for Integrity, do you?

A. I do not.

Q. Okay. So it could be that some of these people left because they're [sic] salary was doubled over at Integrity, correct?

A. I –

Q. Could be?

A. I'd be unfamiliar with what their [sic] paid at Integrity, right.

Q. You'd be unfamiliar for the--and just generally speaking, you would be unfamiliar for the true reasons as to why they left Oxford. Don't we have that right? Let's be honest now. You would be unfamiliar for the true reasons as to why they any of these people on P-1 left Oxford?

A. Well, if Integrity didn't exist, they'd still be working for us.

Q. All right. Please, just answer my question. Would you in fact be unfamiliar with the true reasons as to why any of these people left Oxford? That just calls for a yes or no. Be honest with me.

A. I'm not a mind reader.

Q. Okay. You don't know.

A. Okay.

Q. Isn't that right? Come on.

A. Yeah. I don't know the--

Q. Okay.

A. --the exact reason why a person would leave a position. You're correct.

. . .

Q. And you don't know if any one of these people, even those listed on P-6, was ever contacted by either Pearl Copeland or LuAnn Helms, do you?

A. I personally do not.

Q. That's right. And, again, you wouldn't know of your own personal knowledge why any of these so-called clients really and truly left Oxford and went to Integrity; [sic] isn't that right?

A. Personally, I did not--

Q. Yeah.

A. You know, I was--Can I talk just a minute here?

Q. Yeah. Personally you haven't talked to any of them?

A. No. I have not talked to any of the clients.

Q. Okay.

A. I do know that I have talked to people at Oxford that have talked to the case manager that has said that they--

Q. Okay.

A. --the clients wished to switch services because they wanted to be taken care of by the same aide that they've always had.

See also, Tr. 26-29, 51-52, 65-67.

Finally, as to the amount of costs and lost income from such lost employees and clients, there was, once again, no contrary evidence by Copeland and Helms.

4. Summary:

Given that Integrity could have only existed and been in competition with Oxford during the period of February through July 3, 2000 based on the action of Copeland in allowing her Certificate of Provider Certification Training to be used by Integrity to contract with the Missouri Division of Aging, causation exists, and Copeland should be held accountable for the employees and clients lost by Oxford to Integrity during such period of time. *See Mills v. Murray*, 472 S.W.2d 6, 16-17 (Mo. App. 1971).

B. Point II – Public Policy Argument –

In Point II of their Reply Brief, Appellants reply to the *Amicus Curiae* Brief of the Missouri Hospital Association ("MHA"), relating to the public policy of not-for-profit corporations enforcing non-compete agreements. They first state (Appellants' Reply Brief, at p. 8):

> MHA has, as did Oxford, suggested that not-for-profit corporations have the same powers as for profit corporations. This is not so. . . . [Emphasis added.]

However, Appellants' statement in this regard is directly refuted by Missouri statute and case law. For example, *see* Mo. Rev. Stat. § 355.131, and *City of St. Louis v. Institute of Medical Education and Research*, 786 S.W.2d 885, 888 (Mo. App. 1990),

where the court of appeals affirmed that the powers of not-for-profit corporations and for-profit corporations are identical.

Second, Appellants continue to confuse the various concepts of "revenue," "protection of assets," and "profit." The issue relating to tax-free status is not whether or not an entity operates financially prudently, receives revenue, protects its assets, and/or produces earnings. Rather, the tax issue is what the entity does with its revenue and earnings. Either the entity is for-profit, thereby distributing its profits to its owners and shareholders, or it is not-for-profit, and thereby does good works with its revenue and earnings for the good of the public, including protecting its assets, continuing its services, and growing the charitable organization.

To accept Appellants' public policy argument would turn not-for-profits/charities into involuntary servitudes, requiring them to virtually give/lose their assets to competitive for-profit organizations.

What Appellants seem to really be advocating is to eliminate non-competes. However, Appellants fail to recognize that non-competes have a valid and legal purpose. Non-competes are used to prevent unfair competition, which is exactly what occurred in this case. To refuse to enforce the non-compete agreements as Appellants request, simply because Respondent is organized as a not-for-profit corporation, would penalize Respondent, which Appellants affirmatively state should not be done. *See* Appellants' Reply Brief, at p. 13. ("In summary, not-for-profit corporations engaged in the delivery of much needed healthcare services should not be penalized because they are required to engage in some competition.")

Accordingly, the Trial Court appropriately rejected Appellants' new and novel "public policy" argument.

II.

CONCLUSION

WHEREFORE, for the above-outlined reasons, Oxford again respectfully requests that this Court affirm the Trial Court's finding of breach by Copeland and Helms of their Non-Compete Agreements with Oxford, reverse the Trial Court's refusal to issue damages against Copeland, issue a Judgment for damages against Copeland in the amount of $33,093.21, and for any other relief the Court deems just and proper.

Respectfully submitted,

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Dated this 9th day of January, 2006.

CERTIFICATION AS TO SUBSTITUTE REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT

I, Rick E. Temple, hereby certify that the Substitute Reply Brief of Respondent/Cross-Appellant being filed this date:

1. Includes the information required by Rule 55.03;

2. Complies with the limitations contained in Rule 84.06(b); and

3. Contains 1,947 words.

I also certify that the disk copy of the Substitute Reply Brief of Respondent/Cross-Appellant also being filed this date has been scanned for viruses and is virus-free.

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DATED: This 9th day of January, 2006.

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing Substitute Reply Brief of Respondent/Cross-Appellant was served on the following party by United States mail, postage prepaid, on this 9th day of January, 2006, to wit:

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